

6 Official Opinions of the Compliance Board 57 (2008)

ADMINISTRATIVE FUNCTION EXCLUSION – COUNTY COUNCIL’S PROCESS OF APPOINTING PLANNING BOARD MEMBERS HELD TO FALL UNDER EXCLUSION – SCOPE OF ACT – ACT DOES NOT GOVERN ACTIONS TAKEN OUTSIDE OF A MEETING IN ABSENCE OF A QUORUM – ACT DOES NOT ADDRESS RETENTION OF RECORDS NOT GOVERNED BY ACT

October 24, 2008

Robin Ficker

The Open Meetings Compliance Board has considered your complaint that the Montgomery County Council violated the Open Meetings Act during a public meeting June 12, 2008, during which interviews were conducted for positions on the Montgomery County Planning Board. Specifically, you have suggested that the Act was violated by comments discouraging your attendance in light of your candidacy for a position on the Planning Board and by the destruction of records reflecting the Council members’ votes as to which candidates merited public interviews. For the reasons explained below, we conclude that the Act did not apply; thus, no violation occurred.

I

Complaint and Response; Supplemental Record

Your complaint raised a series of questions primarily based on comments by some members of the Montgomery County Council during a public meeting, on June 12, 2008, during which public interviews were conducted to fill vacancies on the Planning Board. We have taken the liberty of distilling your complaint into two questions:

- (1) Did the Council violate the Act as a result of comments by Council members during the public meeting discouraging you, a member of the public, from attending the meeting because you happened to be a candidate for a position on the Planning Board?

- (2) Did the Council's destruction of the votes of Council members as to which candidates merited public interviews violate the Act?

Attached to the complaint was an unofficial transcript of portions of the meeting which you apparently produced.

In a timely response on behalf of the County Council,¹ Michael Faden, Senior Legislative Attorney, argued that the meeting addressed in the complaint was not subject to the Open Meetings Act. Citing §10-503(a)(1)(i),² the response noted that because the Council directly appoints the members of the Planning Board, the "process falls squarely within the administrative function exclusion from the law's open meeting requirement."

However, because the Council has traditionally treated the process of appointing members of the Planning Board as if the Open Meetings Act applied, the response went on to address the allegations in the complaint. While acknowledging that some Council members discussed your exclusion because of your candidacy for the Planning Board, the response noted that you were not removed and argued that no other action was taken that would have violated the Act. Thus, the questions posed were "entirely hypothetical." Furthermore, the Council could have closed the interviews as a personnel matter under §10-508(a)(1) had it chose to do so. The response acknowledged that, when the Open Meetings Act applies, a meeting is open or closed and cannot be closed to select individuals. However, the Council has a longstanding informal practice of asking applicants for a position to refrain from attending other candidates' interviews. "As far as Council staff knows, the Council has never 'barred' or excluded a member of the public from an open interview session." The response noted that the unofficial transcript submitted with the complaint, to the extent it accurately reflected the events during the meeting, showed that Councilman Leventhal preferred to restrict you from attending and that Council President Knapp briefly considered the matter, but ultimately, no action was taken. The response further noted the complaint misstated the Council's procedures for selecting which candidates would be granted an interview. A staff member sends each member of the Council a list of applicants and asks that each Council member check off each applicant that the Council member would like to interview. The staff then schedules interviews for each applicant that received three or more checks. Those lists are then thrown away. The selection process does not occur during a Council meeting.

¹ The Compliance Board granted the County Council a brief extension of time in which to respond.

² Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

After receiving the Council's response, you wrote asking that we consider the fact that the Council's press release dated March 17, 2008, indicated that "interviews are conducted in public." It did not indicate that applicants were discouraged from attending. Furthermore, you noted that you were not scheduled to be interviewed at the time. Your letter also referenced certain statements by the Council President indicating that applicants should wait outside the meeting room. As expressed in your letter, "it was the position of [the Council President] that the meeting was public, but that a certain member of the public should not be present and that applicant-member of the public should not be given a public interview ... as a result of being in attendance at a public meeting." Finally, you alleged that the Council's practice of sending written votes to a staff member who tabulates and destroys any record of the individual votes violated the Open Meetings Act.

On receipt of your follow-up letter, we offered the Council an opportunity to respond. However, the Council indicated that no further response was necessary.

II

Analysis

A. Public Attendance

The gist of your complaint is whether a public body may conduct a public meeting at which it conducts interviews of applicants for an office while precluding a member of the public from attending (or considering precluding attendance) because the individual has applied for the position under consideration. Except as otherwise provided under the Open Meetings Act, a public body is required to meet in open session. §10-505. And "[w]henever a public body meets in open session, the general public is entitled to attend." §10-507(a). As we previously explained, "[w]hen the ... Open Meetings Act requires a meeting to be open, it must be open to all. The Act does not contain an intermediate category of 'partially open' meetings, to which some members of the public are admitted and others excluded." 2 *OMCB Opinions* 67, 69 (1999).³

However, not every meeting of a public body is governed by the Open Meetings Act. Thus, we must first consider the question raised by the Council's response – whether the Open Meetings Act applied. Even though the Council

³ To be sure, under the Open Meetings Act, a public body may have an individual removed from a meeting governed by the Act if the presiding officer determines that the individual's behavior is disrupting the open session. §10-507(c)(1). While the unofficial transcript reflected comments about calling security, the Council did not actually have you removed nor does your complaint suggest that you were removed on this basis.

treated the meeting as if the Act applied, if the session involved an administrative function as argued in the response, neither the substantive nor the procedural provisions of the Act would have applied, §10-503(a)(1)(i), and no violation of the Act could have occurred. 4 *OMCB Opinions* 188, 191 (2005) (addressing executive function - - now administrative function – exclusion under the Act).⁴ This is true even if the public body otherwise voluntarily conducted the meeting as if it were subject to the Open Meetings Act.

The relevant definition is as follows:

(1) “Administrative function” means the administration of:

- (i) a law of the State;
- (ii) a law of a political subdivision of the State; or
- (iii) a rule, regulation, or bylaw of a public body.

(2) “Administrative function” does not include:

- (i) an advisory function;
- (ii) a judicial function;
- (iii) a legislative function;
- (iv) a quasi-judicial function; or
- (v) a quasi-legislative function.

§10-502(b). Applying this definition involves a two-part test. First, we inquire whether the topic of discussion falls within the definition of any alternative defined function. If so, the analysis ends, because a topic covered by another definition cannot be an administrative function. If the topic of discussion does not fall under

⁴ While there are exceptions to the administrative function exclusion, namely the granting of a license or permit or any zoning matter, these exceptions are not relevant here. §10-503(b). The reference to zoning matters has been broadly construed as extending to the consideration of development or subdivision plans. *Wesley Chapel Bluemount Ass’n v. Baltimore County*, 347 Md. 125, 699 A.2d 434 (1997). However, we do not believe the reference to “zoning matters” could reasonably be construed as extending to the appointment of the members of the Planning Commission.

an alternative defined function, we inquire whether the public body was involved in the “administration of” an existing law. Implicit in the second step are two subsidiary points: There must be an identifiable prior law or regulation to be administered and the public body must be vested with legal responsibility for its administration. 5 *OMCB Opinions* 121, 124 (2007).

In evaluating candidates to select whom they would name to the Planning Board, the Council was not engaged in any other defined function. *See, e.g.,* 2 *OMCB Opinions* 45, 47 (1999) (process by which Board of County Commissioners makes Planning Board appointments is executive (now administrative) function). In this case, the Council was carrying out its statutory obligation to appoint individuals to the Planning Board. *See* Article 28, §§2-101 (appointments to MNCPPC) and 7-111(a) (Council’s appointees serve as the County Planning Board), Annotated Code of Maryland. To be sure, the County Executive is to approve or disapprove the appointment, subject to override by a supermajority of the Council. Article 28, §2-101(a). However, unlike situations where the public body is confirming an appointment by another official (a legislative function in the parlance of the Open Meetings Act), in Montgomery County, it is the County Council that is charged with making the appointment.⁵

Thus, the County Council was engaged in an administrative function at the session on June 12 when it considered candidates for the Planning Board. Accordingly, the Open Meetings Act did not apply. We decline to address the remainder of the complaint and the Council’s response relating to this session given that no violation of the Act could have occurred.

B. Selection of Interviewees

Although the Open Meetings Act did not apply to the Council’s selection process when it was filling vacancies on the Planning Board, we shall briefly address the nonapplication of the Act to a separate issue raised in your complaint and followup letter. You alleged that the process by which candidates were selected for interviews violated the Act in that it was done outside of a meeting and voting records were not retained. Although other law might require that a public body act only during the course of a meeting, the Open Meetings Act has no such requirement. It simply sets rules that must be followed when a meeting subject to the Act occurs. 2 *OMCB Opinions* 70, 71-72 (1999); *see also* 81 *Opinions of the Attorney General* 140, 141-144 (1996). Furthermore, the Open Meetings Act only addresses certain records pertaining to meetings of a public body, *i.e.*, meeting

⁵ The appointment process is subject to certain procedural requirements found in Article 28, §2-114. However, our jurisdiction is limited to construing the Open Meetings Act and we express no opinion as to whether requirements outside the Open Meetings Act were observed.

notices, minutes, statements documenting closing of meetings. §§10-506, 10-508(d), and 10-509. Assuming *arguendo* that the Act had some application to the Council's appointment of members to the Planning Board (we hold that it does not), the documents surveying Council members as to who merited an interview were not governed by the Act.

III

Conclusion

The Open Meetings Act did not apply to the Council's meeting on June 12, 2008, to the extent it involved the selection of candidates for the Planning Board. Nor did the Council violate the Open Meetings Act through the methodology employed to select candidates who would be publicly interviewed or in the failure to maintain the related survey sheets.

OPEN MEETINGS COMPLIANCE BOARD

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